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No. 331

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNION PLANTERS NATIONAL BANK OF MEMPHIS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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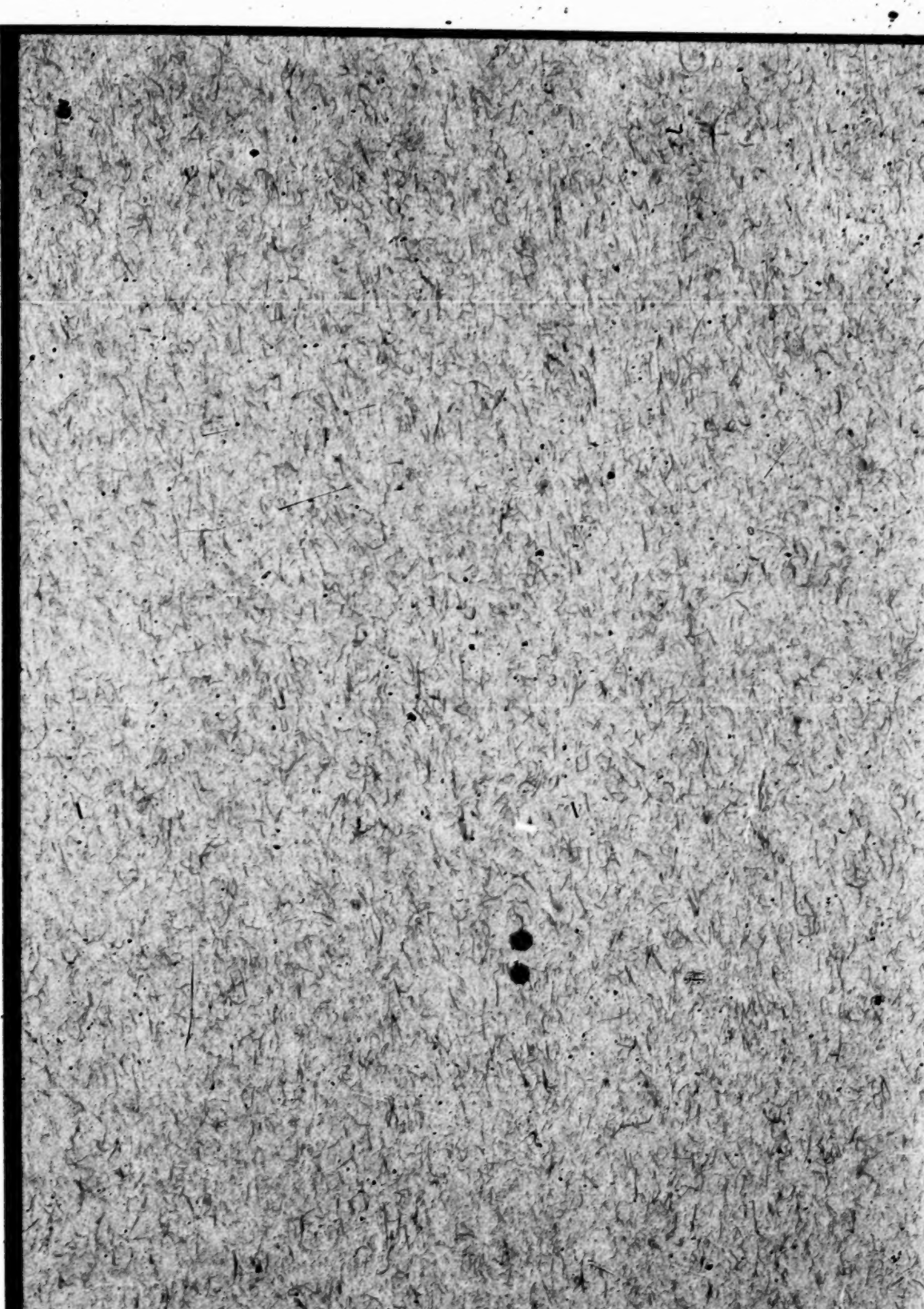

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This case presents the same question as that raised in *American National Bank of Austin* v. *United States*, 421 F. 2d 442 (C.A. 5), taxpayer's petition for certiorari pending, No. 168, this Term—whether a national bank was taxable on interest it received on certain municipal bonds because, in substance, it acquired and held these bonds not as the owner thereof, but as a secured lender.

In each case, the taxpayer contended and the district court found that the form of the transactions be-

tween the bank and municipal bond dealers, under which the bank was the owner of the bonds, was determinative of the tax consequences. Accordingly each district court held that, as owner, the bank was entitled to exclude the interest on the bonds from gross income under Section 103 of the Internal Revenue Code.

On appeal in each case, the court of appeals held that the ultimate question presented—whether the bank was the owner of the bonds or a secured lender—was one of law, subject to plenary review on appeal, rather than one of fact, subject to limited review under the clearly erroneous rule. Each court of appeals also held that, notwithstanding the form of the transactions between the bank and dealers, the dealers were the true owners of the bonds, the bank was a lender with the bonds pledged as security for the loans, and the interest received by the bank was in substance interest collected on loans to the dealers and not tax-exempt interest on the bonds. Accordingly, the district court decision in each case was reversed, the Sixth Circuit below relying on the Fifth Circuit's opinion in *American National Bank* (Pet. App. A6).

The salient facts in the two cases are identical for purposes of legal analysis. Critical to the conclusions of both courts of appeals were the following: that the banks bore no risks of fluctuations in the market prices of bonds; that their profits from the transactions were limited to the interest accrued while they held the bonds; that it was understood that the banks would permit dealers to "repurchase" bonds at the

original prices; that the banks never refused to "resell" the bonds to dealers; that, in almost every instance, the dealers in fact repurchased the bonds; and finally, that the dealers alone fixed the prices at which the bonds were sold to the public.[1]

In seeking further review, petitioner makes the same arguments that were made by the taxpayer in its petition for certiorari in *American National Bank*.[2] Those arguments are dealt with at length in our brief in opposition in that case, on which we here rely.[3] In addition, petitioner makes two contentions not advanced in *American National Bank*. Neither of these has merit.

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[1] As pointed out by the Sixth Circuit below (Pet. App. A6) and acknowledged by petitioner (Pet. 15), there are only two differences worthy of mention between the taxpayer's operations in *American National Bank* and those of petitioner. First, while in the Fifth Circuit case, there were no written agreements between the bank and dealers, petitioner's arrangements with dealers were in some instances reduced to writing. Second, the dealers in *American National Bank* had only the option to "repurchase" bonds, while the dealers here could be required by petitioner to "repurchase" bonds at any time in order to insure petitioner against a loss. If material at all, these differences would suggest that the instant case is stronger for the government than *American National Bank*. See Pet. App. A6.

[2] Like the taxpayer in *American National Bank*, petitioner asserts conflict regarding the proper scope of appellate review with *Commissioner* v. *Bank of California*, 80 F. 2d 389 (C.A. 9), and *First National Bank in Wichita* v. *Commissioner*, 57 F. 2d 7 (C.A. 10). Petitioner also cites *Commissioner* v. *Wells Fargo Bank & Union Trust Company*, 80 F. 2d 390 (C.A. 9). That case was decided in conjunction with, and on the authority of, *Bank of California*, without further opinion.

[3] Copies of our brief in opposition in *American National Bank* are being served on counsel for petitioner herein.

First, petitioner argues (Pet. 16-18) that the decision below conflicts with *Helvering* v. *Clifford*, 309 U.S. 331. The ultimate question there was whether the grantor of a short-term trust was taxable on trust income as owner of the trust corpus, even though in form and for local law purposes his wife was the beneficiary of the trust. This Court did not hold in *Clifford* that the question of ownership of property was one of fact, subject only to limited review on appeal, as petitioner contends. On the contrary, like the Fifth Circuit in *American National Bank* and the Sixth Circuit here, the Court recognized (309 U.S. at p. 336) that a number of considerations were relevant in determining the ownership of property and that no one fact was dispositive. In concluding that the grantor remained the owner and was taxable on the income of the trust, the Court stated (*id.*, pp. 336-337): "To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements." That, in essence, is the approach taken by the Fifth and Sixth Circuits in *American National Bank* and in this case. The approach of the circuit courts does not conflict in substance or in principle with this Court's brief references in *Clifford* (309 U.S. at pp. 336, 338) to the responsibilities of the trier of fact in cases of this type.[4]

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[4] *Helvering* v. *Clifford* was neither discussed nor cited in *Commissioner* v. *Duberstein*, 363 U.S. 278, upon which peti-

Second, petitioner urges (Pet. 18-19) that this is an important issue which should be settled by this Court in order to insure uniform treatment of banks engaging in similar transactions. But the clearly erroneous standard of appellate review for which petitioner contends would preclude (even within the same judicial circuit) the uniformity of treatment which petitioner says is essential. This is shown by the decisions on similar facts in *Commissioner* v. *Bank of California*, 80 F. 2d 389 (C.A. 9), and *First National Bank in Wichita* v. *Commissioner*, 57 F. 2d 7 (C.A. 10) (Pet. 13-15). In those cases, the Ninth and Tenth Circuits affirmed lower court holdings for the bank and the Commissioner, respectively, on the ground that there was record support for the opposite conclusions reached by the triers of fact.[5] Although the question presented here is not without significance in the area of financing dealers' inventories of municipal bonds, the decision below and

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tioner also relies (Pet. App. 16-18) in connection with its scope of review argument. As we show in our brief in opposition in *American National Bank* (p. 8), and as held by the court below (Pet. App. A5), the rule of the *Duberstein* case is inapplicable here.

[5] There is no merit to petitioner's claim (Pet. 19) that *Bank of California* is indicative of congressional policy regarding Section 103 of the Internal Revenue Code. That decision, being simply an affirmance on the facts of a lower court decision favorable to a bank, established no uniform federal policy with respect to the treatment of banks and dealers. Moreover, Congress' failure to react to *Bank of California* is no more significant than its failure to react to the decision favorable to the Commissioner in the *First National Bank in Wichita* case.

that of the Fifth Circuit in *American National Bank* do no more than bar the transfer to a bank of a tax exemption privilege which properly belongs to the dealers (but which they could not use to their advantage). There is thus no reason for further review unless and until a clear-cut present conflict arises in the circuits.

For the reasons stated above and in our brief in opposition in *American National Bank*, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1970.

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